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TAGS: PGOV PHUM PREL HK CH PINR MC
SUBJECT: LEGCO PASSES COVERT SURVEILLANCE BILL

REF: A. HONG KONG 3109
1B. HONG KONG 0465

CLASSIFIED BY: ACTING E/P CHIEF JEFF ZAISER. REASONS: 1.4(B,D).

11. (C) SUMMARY: ON AUGUST 6, THE LEGISLATIVE COUNCIL (LEGCO) PASSED A CONTROVERSIAL LAW REGULATING THE USE OF COVERT SURVEILLANCE, INTERCEPTION OF TELECOMMUNICATIONS, AND INTERCEPTION OF POSTAL COMMUNICATIONS BY HONG KONG LAW ENFORCEMENT AGENCIES. PRO-DEMOCRACY LAWMAKERS CRITICIZED THE LEGISLATION FOR GRANTING TOO MUCH POWER TO LAW ENFORCEMENT AGENCIES AND STAGED A MASS WALKOUT PRIOR TO THE LEGCO VOTE. CHIEF EXECUTIVE (CE) DONALD TSANG DISMISSED CRITICISM OF THE LAW, SAYING IT WAS FAIRER AND MORE PROTECTIVE OF PRIVACY THAN SIMILAR LAWS IN THE WORLD'S MOST OPEN DEMOCRACIES. HE SAID THE PUBLIC COULD REST ASSURED THAT THE POLICE WOULD NOT BYPASS OR ACT BEYOND THE LAW. PROFESSOR JOHANNES CHAN, DEAN OF THE HONG KONG UNIVERSITY SCHOOL OF LAW, TOLD US ON AUGUST 7 THAT WHILE THE NEW LAW HAS SOME PROBLEMATIC FEATURES, IT OFFERS "AN ACCEPTABLE SYSTEM OVERALL" AND MERELY LEGALIZES WHAT IS ALREADY TAKING PLACE IN PRACTICE. CHAN SAID THE GOVERNMENT'S HANDLING OF THE LEGISLATION HAD LED TO FURTHER POLARIZATION BETWEEN THE POLITICAL PARTIES IN LEGCO AND ALSO CAUSED AN EROSION OF TRUST BETWEEN THE GOVERNMENT AND THE DEMOCRATS. PRIOR TO THE FINAL VOTE, LEGISLATOR "LONG HAIR" LEUNG KWOK-HUNG LAUNCHED A LEGAL CHALLENGE TO LEGCO PRESIDENT RITA FAN'S REFUSAL TO ALLOW A VOTE ON MANY OF THE AMENDMENTS OFFERED BY PRO-DEMOCRACY LEGISLATORS. ANALYSTS SAID LEUNG'S CHALLENGE COULD HELP SETTLE THE QUESTION OF HOW MUCH POWER LEGCO HAS IN AMENDING LAWS DRAFTED BY THE ADMINISTRATION.
END SUMMARY.

BILL PASSES AS DEMOCRATS STAGE WALKOUT

12. (SBU) IN THE EARLY HOURS OF AUGUST 6, LEGCO PASSED THE CONTROVERSIAL INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL BY A VOTE OF 32 TO ZERO AFTER A RECORD 57 HOURS OF DEBATE OVER FIVE DAYS. AS EXPECTED, THE BILL GARNERED NO SUPPORT FROM PRO-DEMOCRACY LEGISLATORS (SEE REF A), WHO STAGED A MASS WALKOUT IN PROTEST OF THE BILL. PRO-DEMOCRACY LAWMAKERS SAID THE LEGISLATION GIVES LAW ENFORCEMENT AGENCIES TOO MUCH POWER AND PROVIDES INSUFFICIENT PROTECTION AGAINST ABUSE OF THAT POWER. THE NEW LAW WILL BE GAZETTED (PUBLISHED) ON AUGUST 9, ALONG WITH A NEW CODE OF PRACTICE FOR LAW ENFORCEMENT AGENCIES, A DAY AFTER THE COURT-IMPOSED DEADLINE TO HAVE NEW ARRANGEMENTS IN PLACE. A COMMISSIONER FOR COVERT SURVEILLANCE AND A PANEL OF JUDGES TO VET SURVEILLANCE APPLICATIONS FROM LAW ENFORCEMENT AGENCIES WILL BE NAMED THE SAME DAY.

¶13. (SBU) CHIEF EXECUTIVE (CE) DONALD TSANG DISMISSED CRITICISM OF THE LAW, SAYING "I BELIEVE OUR SYSTEM IS AS GOOD AS THOSE AMONG THE MOST DEMOCRATIC JURISDICTIONS IN THE WORLD." HE SAID THE PUBLIC COULD REST ASSURED THAT THE POLICE WOULD NOT BYPASS OR ACT BEYOND THE LAW. SECRETARY FOR SECURITY AMBROSE LEE SAID THE LAW STRIKES THE RIGHT BALANCE BETWEEN EFFECTIVE LAW ENFORCEMENT AND PROTECTION OF PRIVACY. POLICE COMMISSIONER DICK LEE SAID THE LAW GAVE OFFICERS SUFFICIENT LEGAL GROUND TO ADOPT SURVEILLANCE TECHNIQUES PROVEN EFFECTIVE IN OTHER ADVANCED COUNTRIES.

OVERVIEW OF THE NEW LAW

¶14. (SBU) THE NEW LAW REGULATES THE USE OF COVERT SURVEILLANCE, INTERCEPTION OF TELECOMMUNICATIONS, AND INTERCEPTION OF POSTAL COMMUNICATIONS BY HONG KONG LAW ENFORCEMENT AGENCIES. IT ESTABLISHES A TWO-TIERED SYSTEM FOR LAW ENFORCEMENT OFFICIALS TO GAIN APPROVAL FOR SURVEILLANCE ACTIVITIES. "MORE INTRUSIVE" SURVEILLANCE REQUIRES THE APPROVAL OF A JUDGE FROM A PANEL APPOINTED BY THE CE. "LESS INTRUSIVE" SURVEILLANCE MERELY REQUIRES THE APPROVAL OF A SENIOR LAW ENFORCEMENT OFFICIAL, EQUIVALENT TO THE RANK OF SENIOR SUPERINTENDENT OR ABOVE, WITHIN THE RELEVANT LAW ENFORCEMENT DEPARTMENT. COVERT SURVEILLANCE IS CONSIDERED "MORE INTRUSIVE" IF, FOR EXAMPLE, A REMOTE LISTENING DEVICE WERE USED; INTERCEPTION OF TELECOMMUNICATIONS IS CONSIDERED "MORE INTRUSIVE" IF, FOR EXAMPLE, BOTH PARTIES TO THE CONVERSATION WERE UNWITTING.

¶15. (SBU) AUTHORIZATION TO CONDUCT SURVEILLANCE CAN ONLY BE GRANTED TO PREVENT OR DETECT "SERIOUS CRIME," OR PROTECT "PUBLIC SECURITY," THOUGH THE DEFINITIONS OF THOSE TERMS REMAIN UNCLEAR. APPLICATIONS TO INTERCEPT TELECOMMUNICATIONS MUST INVOLVE CRIMES WITH A PENALTY OF AT LEAST SEVEN YEARS IMPRISONMENT, WHILE APPLICATIONS FOR COVERT SURVEILLANCE MUST INVOLVE CRIMES SUBJECT TO IMPRISONMENT FOR AT LEAST THREE

YEARS OR A HK1\$ MILLION (USD 128,000) FINE. AUTHORIZATIONS WILL HAVE A MAXIMUM DURATION OF THREE MONTHS, BUT WILL BE RENEWABLE. THE LAW REQUIRES THE CE TO APPOINT AN INDEPENDENT COMMISSIONER TO AUDIT THE PROGRAM AND HANDLE COMPLAINTS FROM THE PUBLIC. (SEE REF B FOR ADDITIONAL DETAILS ON THE LEGISLATION).

AN ASSESSMENT OF THE LAW BY A FAIRLY NEUTRAL OBSERVER

¶16. (C) PROFESSOR JOHANNES CHAN, DEAN OF THE HONG KONG UNIVERSITY SCHOOL OF LAW, TOLD US ON AUGUST 7 THAT WHILE THE NEW LAW HAS SOME PROBLEMATIC FEATURES, IT OFFERS "AN ACCEPTABLE SYSTEM OVERALL" AND MERELY LEGALIZES WHAT IS ALREADY TAKING PLACE IN PRACTICE. MOREOVER, THE NEW SYSTEM IS "PREFERABLE TO WHAT EXISTED BEFORE," SAID CHAN, BECAUSE IT INCORPORATES SOME ADDITIONAL SAFEGUARDS. HE ADDED THAT, WHILE PEOPLE CAN LEGITIMATELY CRITICIZE SOME OF THE DETAILS OF HOW THE TWO-TIERED SYSTEM IS SET-UP, IN GENERAL, HAVING TWO TIERS MAKES SENSE DUE TO THE NUMBER OF SURVEILLANCE REQUESTS EXPECTED -- MORE THAN 3000 PER YEAR. CHAN SAID IT IS SIMPLY NOT FEASIBLE TO HAVE A JUDGE VET EACH OF THESE REQUESTS. AS CHAN SEES IT, THE BIGGEST POTENTIAL PROBLEM WITH THE LAW IS THE "SPECIAL SECURITY VETTING" OF PANEL JUDGES. CHAN CALLED THIS VETTING "QUITE WORRYING" BECAUSE OF ITS IMPLICATIONS FOR THE INDEPENDENCE OF THE JUDICIARY IF THE PROCESS WERE USED FOR POLITICAL PURPOSES.

¶17. (C) DESPITE HIS FAIRLY BENIGN VIEW OF THE SUBSTANCE OF THE NEW LAW, CHAN SAID THE PROCESS OF ENACTING THE LEGISLATION WAS HANDLED SO BADLY THAT IT COULD HAVE A LASTING IMPACT. CHAN SAID THAT RUSHING THE BILL THROUGH AT THE LAST MINUTE HAD LED TO FURTHER POLARIZATION BETWEEN THE POLITICAL PARTIES IN LEGCO. AT THE SAME TIME, THE GOVERNMENT'S EFFORTS TO WORK WITH THE PRO-BEIJING PARTIES TO THWART DEMOCRATIC AMENDMENTS CAUSED AN EROSION OF TRUST BETWEEN THE GOVERNMENT AND THE DEMOCRATS. THAT TRUST WILL NOT BE EASILY REGAINED, SAID CHAN.

ANOTHER THORNY ISSUE ARISES

¶18. (SBU) EVEN BEFORE THE FINAL VOTE, LEGISLATOR "LONG HAIR" LEUNG KWOK-HUNG LAUNCHED A JUDICIAL REVIEW CHALLENGING LEGCO PRESIDENT RITA FAN'S REFUSAL TO TABLE MANY OF THE AMENDMENTS OFFERED BY PRO-DEMOCRACY LEGISLATORS. (NOTE: ABOUT 200 PAN-DEMOCRATIC AMENDMENTS WERE APPROVED BY FAN, BUT ALL WERE VOTED DOWN. END NOTE.) ARTICLE 74 OF THE BASIC LAW STATES THAT INDIVIDUAL MEMBERS CANNOT INTRODUCE LEGISLATION THAT AFFECTS GOVERNMENT EXPENDITURE OR EXISTING GOVERNMENT POLICY. WHILE ARTICLE 74 PLACES NO EXPLICIT RESTRICTIONS ON THE ABILITY OF MEMBERS TO OFFER AMENDMENTS TO BILLS, FAN REJECTED MANY INDIVIDUAL AMENDMENTS TO THE COVERT SURVEILLANCE BILL ON THE GROUNDS THAT THEY AFFECTED GOVERNMENT EXPENDITURE OR EXISTING POLICY. LEUNG ARGUES THAT FAN'S DECISION VIOLATED THE BASIC LAW. THE HIGH COURT ANNOUNCED ON AUGUST 5 THAT IT ACCEPTED LEUNG'S REQUEST FOR A JUDICIAL REVIEW.

¶19. (SBU) HONG KONG UNIVERSITY PROFESSOR SIMON YOUNG SAID LEUNG'S CHALLENGE COULD HELP SETTLE THE QUESTION OF HOW MUCH POWER LEGCO HAS IN AMENDING LAWS DRAFTED BY THE ADMINISTRATION. CITY UNIVERSITY PROFESSOR JAMES SUNG OPINED THAT LEUNG'S CHALLENGE OPENS A WHOLE NEW CAN OF WORMS BY TOUCHING ON THE COMPLICATED AND VERY TWISTED POWER RELATIONSHIP BETWEEN LEGCO, THE HONG KONG SAR GOVERNMENT, AND THE CENTRAL GOVERNMENT.

SAKAUE